Supreme Court, U.S.
FILED

(1)

No. 97 1479 MAR 6 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

CARLOS DIAZ as personal representative of the estate of LAZARO DIAZ on behalf of the estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ,

Petitioner,

vs.

CCHC-GOLDEN GLADES, LTD., a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE, INC., general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

HOPPE & STOKES, P.A.
66 West Flagler Street
Second Floor
Miami, Florida 33130
(305) 358-9060

ARNOLD R. GINSBERG
Counsel of Record
ARNOLD R. GINSBERG, P.A.
66 West Flagler Street, #410
Miami, Florida 33130
(305) 358-0427

Attorneys for Petitioner

145089

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

33 pp

QUESTIONS PRESENTED

1. The District Court of Appeal of Florida, Third District, decided an important question of federal law that has not been, but should be, settled by this Court, to wit: Are the personal injury damages available to a claimant for a violation of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.A. § 1395dd(d)(2)(A) ("EMTALA") determined under a state's general wrongful death statute or under a state's medical negligence statute when the damages available thereunder differ or are mutually exclusive [under the Florida wrongful death statute adult survivors are entitled to pain and suffering damages when death is occasioned by any cause other than *"medical negligence"*]?

2. Given that the Florida wrongful death statute, sections 768.21(4) and (8), allow recovery of certain damages occasioned by non-medical negligent conduct, but exclude recovery of those same damages when occasioned by medical negligence: Did the Florida appellate court ignore congressional concerns and misapply federal precedent [recognizing that "EMTALA" is neither a malpractice nor a negligence statute] when it determined that an action brought under EMTALA incorporated "all the vagaries of" the Florida medical malpractice statute such that the EMTALA action before it failed for want of compensable damages?

LIST OF PARTIES

The petitioner, Carlos Diaz, as personal representative of the estate of Lazaro Diaz for and on behalf of the estate of Lazaro Diaz and on behalf of Juan Diaz and Yolando Diaz, lawful survivors under the Florida wrongful death statute, was the plaintiff in the trial court, was the appellant in the District Court of Appeal of Florida, Third District, and was the petitioner to the Florida Supreme Court on application for discretionary review. The respondent, CCHC-Golden Glades, Ltd., a limited partnership with Commonwealth Continental Health Care Inc., general partner, d/b/a Golden Glades Regional Medical Center, Ltd., was the defendant/appellee/respondent. In this petition the parties will be referred to as the petitioner and the respondent and, alternatively, by name. The reference "App." will refer to the rule-required appendix accompanying this petition. All emphasis has been supplied by counsel unless indicated to the contrary.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Reference to the Opinion to be Reviewed	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case and Facts — Federal Questions Raised, Determined and Reviewed	3
Reasons for Granting the Writ	9
Conclusion	19

TABLE OF CITATIONS

Cases Cited:

Brooks v. Maryland General Hospital, Inc., 996 F.2d 708 (4th Cir. 1993)	9
Cleland v. Bronson Health Care Group, 917 F.2d 266 (6th Cir. 1990)	10

Contents

Page

Collins v. DePaul Hospital, 963 F.2d 303 (10th Cir. 1992) 10

Cooper v. Gulf Breeze Hospital, Inc., 839 F. Supp. 1538 (N.D. Fla. 1993) 10

Correa v. Hospital San Francisco, 69 F.3d 1184 (1st Cir. 1995) 9, 11, 13, 14

Diaz v. CCHC-Golden Glades, Ltd., etc., 696 So. 2d 1346 (Fla. App. 3d 1997), *review denied, Diaz v. CCHC-Golden Glades, Ltd., etc.*, 703 So. 2d 475 (Fla. 1997) 1, 8, 17

Gatewood v. Washington Health Care Corp., 933 F.2d 1037 (D.C. Cir. 1991) 11

Holcomb v. Monahan, 30 F.3d 116 (11th Cir. 1994) . 15

Lane v. Calhoun-Liberty County Hospital, Inc., 846 F. Supp. 1543 (N.D. Fla. 1994) 9, 10

Matter of Baby "K", 16 F.3d 590 (4th Cir. 1994) 14, 15, 16, 17

Power v. Arlington Hospital Association, 42 F.3d 851 (4th Cir. 1994) 14

Repp v. Anadarko Mun. Hosp., 43 F.3d 519 (10th Cir. 1994) 15

Contents

Page

Vickers v. Nash General Hospital, Inc., 78 F.3d 139 (4th Cir. 1996) 11, 12

Statutes Cited:

28 U.S.C.A. § 1257(a) 1

42 U.S.C.A. § 1395dd 1, 3

42 U.S.C.A. §§ 1395dd(a) 9

42 U.S.C.A. §§ 1395dd(b) 9

42 U.S.C. §§ 1395dd(a)–(c) 9

42 U.S.C.A. § 1395dd(d)(2)(A) ..... i, 1, 12, 16

Florida Statutes Section 766.102 13

Florida Statutes Section 766.106(1) 13, 15

Florida Wrongful Death Act, Sections 768.16-768.27 2

Florida Wrongful Death Act Section 768.21 2

Florida Wrongful Death Act Section 768.21(4) i

Florida Wrongful Death Act Section 768.21(8) i

Contents

Page

APPENDIX

Appendix A — Opinion Of The District Court Of Appeal Of Florida, Third District Dated July 23, 1997 .... 1a

Appendix B — Final Judgment By The Circuit Court Of The 11th Judicial Circuit In And For Dade County, Florida Dated January 25, 1996 ..... 3a

Appendix C — Decision Of The Supreme Court Of Florida Dated December 8, 1997 ..... 5a

REFERENCE TO THE OPINION TO BE REVIEWED

The opinion herein sought to be reviewed was rendered by the District Court of Appeal of Florida, Third District (App. 1a-2a), now reported, *see Diaz v. CCHC-Golden Glades, Ltd., etc.*, 696 So. 2d 1346 (Fla. App. 3d 1997) with Florida Supreme Court (discretionary), *review denied, Diaz v. CCHC-Golden Glades, Ltd., etc.*, 703 So. 2d 475 (Fla. 1997) (App. 5a-6a).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257(a). Application for review to the Florida Supreme Court was denied on December 8, 1997 (App. 5a-6a) and no application for extension of time has herein been requested.

Petitioner requests this Court to exercise its discretion and to review the merits of this controversy as the opinion of the District Court of Appeal of Florida, Third District, has decided an important question of federal law that has not been, but should be, settled by this Court and has also decided an important federal question that conflicts with decisions rendered by several federal appeals courts.

STATUTORY PROVISIONS INVOLVED

The subject controversy involves the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C.A. § 1395dd, specifically, 42 U.S.C.A. § 1395dd(d)(2)(A), which provides:

* * *

(2) Civil enforcement

(A) Personal harm

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

* * *

Also applicable herein is the Florida Wrongful Death Act, Sections 768.16-768.27, specifically Section 768.21 which as pertinent provides:

* * *

> All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

* * *

> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. *Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.*

* * *

(8) The damages specified in subsection (3) shall not be recoverable by adult children and *the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by § 766.106(1).*

* * *

STATEMENT OF THE CASE AND FACTS — FEDERAL QUESTIONS RAISED, DETERMINED AND REVIEWED

Diaz appealed to the District Court of Appeal of Florida, Third District, from an adverse final summary judgment entered after the trial court determined that Diaz' cause of action against defendant, predicated upon an alleged violation of 42 U.S.C.A. § 1395dd ("EMTALA") *failed* for want of a compensable *damage* claim (R. 912, 915, 922, 923).

The EMTALA claim is found within the four corners of plaintiff's *fourth* amended complaint which complaint (with all extraneous matters herein deleted) alleges:

* * *

FACTS GIVING RISE TO CLAIM

* * *

7. At all times material LAZARO DIAZ, was profoundly retarded and developmentally disabled as defined by F.S. § 393.001(2).

8. At all times material, LAZARO DIAZ, was a resident of Landmark Learning Center.

9. On or about November 17, 1991, LAZARO DIAZ, suffered a fractured femur. On or about November 18, 1991, approximately eleven hours later, LAZARO DIAZ was transported to GOLDEN GLADES REGIONAL MEDICAL CENTER where he spent approximately two hours without treatment before he died due to loss of blood.

* * *

CLAIMS AGAINST GOLDEN GLADES REGIONAL MEDICAL CENTER

COUNT I — VIOLATION OF 42 U.S.C. § 1395dd

20. At all times material the defendant GOLDEN GLADES REGIONAL MEDICAL CENTER had a hospital emergency room department and did provide those ancillary services routinely available to an emergency room department, including a department of radiology.

21. That on or about November 18, 1991, Dorothy Radford accompanied LAZARO DIAZ to GOLDEN GLADES REGIONAL MEDICAL CENTER for the purpose of examination and treatment of a leg injury.

22. That at the time LAZARO DIAZ arrived at GOLDEN GLADES REGIONAL MEDICAL CENTER his condition constituted an emergency.

23. *Under the subject statute the defendant owed a duty to provide an appropriate medical screening examination within the capability of the emergency room department to determine whether or not a medical emergency exists and to provide within the staff and facilities available at the hospital treatment in order to stabilize the condition.*

24. Despite said duties *the hospital failed to do an appropriate screening and/or to stabilize LAZARO DIAZ as follows:*

(a) failed to do an appropriate screening examination as required by the hospital's own standards;

(b) failed to perform a timely x-ray as required by the hospital's own standards;

(c) failed to perform the screening examination on LAZARO DIAZ as would be provided to other GOLDEN GLADES patients under the same or similar circumstances;

(d) failed to properly stabilize LAZARO DIAZ despite knowledge that his condition was an emergency;

(e) failed to perform an examination of LAZARO DIAZ.

* * *

WRONGFUL DEATH DAMAGES

26. . . . As a direct and proximate cause of the death of LAZARO DIAZ the following damages have in the past and will in the future be incurred:

* * *

CLAIM OF JUAN DIAZ AND YOLANDA DIAZ

(a) mental pain and suffering as a result of the wrongful death of their child; (R. 124-137)

* * *

The respondent moved for partial summary judgment as to the above claim (R. 222-230). The respondent reasoned:

> A. Plaintiff is seeking damages under EMTALA which provides that the damages recoverable under a violation of the Act are:
>
> > . . . those damages available for personal injury under the law of the state in which the hospital is located . . . 42 U.S.C. Section 1395dd(d)(2)(A). (R. 225)
>
> B. The only "personal injury" damages available under the law of the state in which the hospital is located is Florida's Wrongful Death Act which, as pertinent, provides:
>
> > 768.21 damages . . . Damages may be awarded as follows:

* * *

> (4) . . . Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

* * *

> (8) . . . The damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by Section 766.106(1) . . . (R. 226)

C. LAZARO DIAZ was 32 years old at the time of his death.

D. Under Florida law a claim for medical malpractice, as defined under Section 766.106(1), Florida Statutes, is:

> a claim arising out of the rendering of, or the failure to render, medical care or services. (R. 226)

The respondent concluded, from the above reasoning, that since the petitioner sought damages under the Florida Wrongful Death Act for the mental pain and suffering of Juan Diaz and Yolanda Diaz as a result of the death of their adult child, Lazaro Diaz, and that since the claims of Juan Diaz and Yolanda Diaz fall squarely within the state statutory definition of a "claim for medical malpractice," no such *compensable* claims can exist under EMTALA (R. 226). Upon entry of final judgment Diaz appealed (R. 905, 906, 922, 923).

On appeal the District Court of Appeal of Florida, Third District, affirmed and in so doing stated:

> Primarily because of the legislative history set out by the Fourth Circuit in *Power v. Arlington Hospital Association*, 42 F.3d 851, 862-63 (4th Cir. 1994), reversing *Power v. Arlington Hospital*, 800 F. Supp. 1384 (E.D. Va. 1992) on this point, we are forced to the conclusion that the Emergency Medical Treatment and Labor Act (*EMTALA*), 42 U.S.C.A. § 1395dd(d)(2)(A)(1992), *incorporates all the vagaries of the state medical malpractice law in the determination of the damages recoverable in an action under the Act.* Accord *Reid v. Indianapolis Osteopathic Medical Hosp., Inc.*, 709 F. Supp. 853 (S.D. Ind. 1989); see also *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 714-15 (4th Cir. 1993).
>
> The unfortunate result in this case, as was correctly held below, is that under the thus applicable exception provided in section 768.21(8), Florida Statutes (1995), the present plaintiffs have no meaningful EMTALA (or Florida) claim whatever for the death of their adult child even if, as alleged, the defendant hospital violated the statute.

"Affirmed." *Diaz, supra*, 696 So. 2d at page 1347.

The petitioner's application to the Florida Supreme Court for discretionary review was denied (App. 5a-6a). This proceeding follows.

REASONS FOR GRANTING THE WRIT

A.

Under EMTALA, every hospital that has both a medicare provider agreement with the Secretary of Health and Human Services and an emergency room or department has a duty to:

> 1. provide to *anyone* presented for treatment an appropriate *medical screening* to determine *whether or not an emergency medical condition exists;*
>
> 2. *stabilize the condition* or, if medically warranted, to transfer the person to another facility if the benefits of transfer outweigh the risks; and
>
> 3. restrict the transfer of a person until that person's condition is stabilized.

See 42 U.S.C. §§ 1395dd(a)–(c). *See also Brooks v. Maryland General Hospital, Inc.*, 996 F.2d 708 (4th Cir. 1993) and *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. 1995).

B.

Congress enacted EMTALA in response to numerous concerns. While the legislative history of EMTALA evinces congressional concern for "patient dumping," the plain language of the statute affords protection to "any individual" regardless of ability to pay. 42 U.S.C.A. §§ 1395dd(a) and (b). As noted by the Court in *Lane v. Calhoun-Liberty County Hospital, Inc.*, 846 F. Supp. 1543 (N.D. Fla. 1994):

> The EMTALA does not require individuals to allege a hospital denied them a screening exam or

> improperly transferred them because the hospital feared they could not pay their bill . . . (citations omitted).

846 F. Supp. at page 1549.

Recovery under EMTALA is *not limited* to cases where hospitals discharge people based on financial considerations. The hospital's duties arise when "any person" appears for examination and treatment. *See Collins v. DePaul Hospital*, 963 F.2d 303 (10th Cir. 1992); *Cleland v. Bronson Health Care Group*, 917 F.2d 266 (6th Cir. 1990) and *Cooper v. Gulf Breeze Hospital, Inc.*, 839 F. Supp. 1538 (N.D. Fla. 1993). An EMTALA plaintiff does not have to plead a specific intent on the part of the hospital in order to state a claim under EMTALA. *Lane v. Calhoun-Liberty County Hospital, Inc.*, supra, 846 F. Supp. at page 1550.

C.

In order for a plaintiff to establish an EMTALA violation, a plaintiff must show:

* * *

> . . . (1) The hospital is a participating hospital, covered by EMTALA, that operates an emergency department (or an equivalent treatment facility); (2) *the patient arrived at the facility seeking treatment; and (3) the hospital either (a) did not afford the patient an appropriate screening in order to determine if she had an emergency medical condition,* or (b) bade farewell to the patient (whether by turning her away, discharging her, or improvidently transferring her) without first stabilizing the emergency medical condition . . .

Correa, supra, 69 F.3d at page 1190. As further noted by the Court in *Correa, supra:*

> *The statute* by its terms *directs a participating hospital to provide an appropriate screening* to all who come to its emergency department. Thus, to prove a violation of EMTALA'S screening provisions, *a plaintiff need not prove* that she *actually* suffered from an *emergency medical condition* when she first came through the portals of the defendant's facility; the failure appropriately to screen, by itself, is sufficient to ground liability as long as the other elements of the cause of action are met.

Correa, supra, 69 F.3d at page 1190.

As to the issue of "screening," the courts have uniformly held that *because a hospital's mere refusal to follow regular screening procedures contravenes EMTALA, nothing else as to that element need be alleged or proved because:*

> EMTALA does not create a cause of action for medical malpractice . . .

See Gatewood v. Washington Health Care Corp., 933 F.2d 1037 (D.C. Cir. 1991); *Correa v. Hospital San Francisco*, 69 F.3d at page 1189, *supra* and *Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139 (4th Cir. 1996):

> The act thereby imposes a "limited duty on hospitals with emergency rooms to provide emergency care to all individuals who come there." (Citations omitted.) *The duty created by EMTALA is a "limited" one in a very critical sense: "EMTALA*

> *is not a substitute for state law malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence.*" (Citation omitted.) We have frequently reaffirmed this limit on the Act's scope (citations omitted) . . . ("Virtually every decision addressing EMTALA has recognized that Congress did not intend for the Act to be a substitute for a state medical malpractice action.") . . . ("The Act was not designed to provide a federal remedy for misdiagnosis or general malpractice.") . . . ("EMTALA is no substitute for state law medical malpractice actions.") . . .

78 F.3d at page 142. As the court in *Vickers, supra*, further noted:

> *EMTALA* "is not intended to duplicate pre-existing legal protections, but rather to *create a new cause of action, generally unavailable under state tort law, for what amounts to failure to treat*" (Citations omitted).

78 F.3d at page 142.

D.

EMTALA, 42 U.S.C. § 1395dd(d)(2)(A), provides:

> *Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may,* in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

It is now established that under EMTALA the "personal injury" therein envisioned includes "death" and the right of the decedent's relatives to seek damages for their own personal loss. *See Correa v. Hospital San Francisco*, 69 F.3d 1184, *supra*, and cases cited thereat. As EMTALA leaves to local law the issue of "those damages available for personal injury," perforce and applicable here is the Florida wrongful death statute, Section 768.21, which provides that (general tort) damages may be awarded as follows:

* * *

> (4) . . . Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors . . .

* * *

> (8) . . . The damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for *medical malpractice as defined by Section 766.106(1).*

Florida Statutes, Section 766.106(1), defines a claim for medical malpractice as "a claim arising out of the rendering of, or the failure to render, medical care or services." However, Section 766.102, Florida Statutes, mandates:

> (1) *In any action for recovery of damages based on the death* or personal injury *of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider . . .* the *claimant shall have the burden of proving* by the greater weight of evidence *that the alleged actions of the health care provider represented a*

> *breach of the prevailing professional standard of care for that health care provider . . .*

Here, *unlike Power v. Arlington Hospital Association*, 42 F.3d 851 (4th Cir. 1994), upon which the Third District relied, recovery under the Florida medical malpractice statute *requires*, as a condition precedent to recovery, medical testimony establishing a departure from the requisite "standard of care." This requirement relates to the *remedy* available under the Florida medical malpractice statute. *EMTALA does not incorporate state court remedies.* Under EMTALA one can recover if there exists a violation of EMTALA. There exists no requirement that in order to establish a viable cause of action under EMTALA, one need present medical expertise establishing a "departure" from the requisite standard of care. In truth, EMTALA does not incorporate any (much less all) of the "vagaries of the Florida medical negligence statute." EMTALA directs that any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of the pertinent section may obtain those damages "available for personal injury under the law of the state in which the hospital is located." Because EMTALA is neither a malpractice nor a negligence statute, the District Court of Appeal of Florida, Third District, clearly misapplied federal precedent and erroneously decided an important question of federal law in applying the medical negligence exception to the Florida wrongful death statute to an action premised upon EMTALA.

The petitioner would suggest to this Court the petitioner has neither pled nor contends, that the violations sued upon constitute medical malpractice. Further, and more important, EMTALA does not create a cause of action for medical malpractice. *See Correa v. Hospital of San Francisco, supra,* and cases cited thereat. As noted by the court in *Matter of Baby "K"*, 16 F.3d 590 (4th Cir. 1994):

> . . . The plain language of *EMTALA requires stabilizing treatment* for any individual who comes to a participating hospital, is diagnosed as having an emergency medical condition, and cannot be transferred. 42 U.S.C.A. Section 1395dd(b).

16 F.3d at page 596.

As noted by the court in *Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519 (10th Cir. 1994), EMTALA is neither a malpractice nor a negligence statute. As further noted by the court in *Holcomb v. Monahan*, 30 F.3d 116 (11th Cir. 1994), EMTALA is not designed to redress a negligent diagnosis by the hospital. The court therein reminded no federal malpractice claims are created.

E.

Under Florida law, upon death, each parent of an adult child may recover for mental pain and suffering if there are no other survivors *except* with respect to claims for medical malpractice as defined by Section 766.106(1). EMTALA, however, does not create a federal claim for medical malpractice nor was it designed to. *Here, petitioner's cause of action arose from a violation of a federal statute which was enacted by Congress with the specific intent to prevent the very result which occurred.* The Florida appellate court's application to EMTALA of the "medical negligence" exception in the Florida wrongful death statute clearly ignores congressional concerns and allows Florida hospitals to "dump" patients without fear of EMTALA suits. As the court noted in *Matter of Baby "K"*, 16 F.3d at page 597, *supra:*

> . . . It is well settled that state action must give way to federal legislation where a valid 'act of congress,' fairly interpreted, is in *actual conflict* with

> the law of the state (citations omitted) and EMTALA provides that *state and local laws that directly conflict with the requirements of EMTALA are preempted.* 42 U.S.C.A. Section 1395dd(f).

16 F.3d at page 597.

The subject cause of action has its genesis in a congressional enactment and not in a state medical negligence statute. EMTALA did not create a federal medical malpractice statute nor will EMTALA itself allow for the interpretation advanced by the respondent, accepted by the trial court and embraced by the Third District. EMTALA specifically provides:

> Any individual who suffers *personal harm as a direct result of a participating hospital's violation of a requirement of this section may*, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C.A. § 1395dd(d)(2)(A). The "personal harm" in this case arose, if it arose at all, as a result of:

> . . . a participating hospital's violation of a requirement of this section . . .

The harm herein complained of did not arise as a consequence of "medical negligence."

Even assuming for a moment the invalidity, inaccuracy and/or legal incorrectness of the petitioner's above "conclusion" and the facts of this case *squarely fit within each statutory definition,* there would then exist a "collision" between the two (conflicting) provisions in their application *to* EMTALA. In that case the

exception (to the statute) must fail in that it incorporates into "the EMTALA remedy" a requirement that a claimant *prove* something not required under EMTALA, to wit: a departure from a medical "standard of care." The exception to the statute must fail as it is:

> . . . well settled that state action must give way to federal legislation where a valid "act of congress," fairly interpreted, is in actual conflict with the law of the state (citations omitted) and EMTALA provides that state and local laws that directly conflict with the requirements of EMTALA are preempted . . .

16 F.3d at page 597.

F.

The petitioner would suggest to this Court that to apply the "medical negligence" *exception* of the Florida wrongful death statute to an EMTALA created cause of action would defeat congressional concerns, would allow state court medical negligence precepts to engrain themselves upon EMTALA situations and would certainly deny to this petitioner (to these claimants) equal protection under the Federal Constitution in that persons similarly situated in other states would be allowed to maintain EMTALA actions and obtain damages for pain and suffering whereas this petitioner, on behalf of these claimants, would not.

Because there exists nothing in EMTALA to suggest that it "incorporates all the vagaries of the *state medical malpractice law* in the determination of the damages recoverable in an action under the Act," *Diaz, supra,* 696 So. 2d at page 1347, it is clear the Florida appellate court both misconstrued and

misapplied controlling federal precedent. Prima facie, the "personal harm" herein suffered arose as a direct result of a participating hospital's violation of a requirement of EMTALA. Such harm arose under a statute that has been judicially construed in the federal system to be neither a malpractice nor a negligence statute. Where, as here, the Florida wrongful death statute excludes certain damages occasioned as a consequence of medical negligence, *but allows the same damages to be recovered when they are sustained as a consequence of, conduct other than "medical negligence,"* it is clear that the result reached ignores congressional concerns. This Court should exercise its discretion and review the merits of this controversy.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioner respectfully urges this Honorable Court to exercise its discretion and to review the merits of the subject controversy. The petitioner would further request that this Court, after merits review, grant the subject petition, quash the opinion of the District Court of Appeal, Third District, and remand this cause with directions to reinstate petitioner's EMTALA cause of action.

Respectfully submitted,

ARNOLD R. GINSBERG
Counsel of Record
ARNOLD R. GINSBERG, P.A.
66 West Flagler Street, #410
Miami, Florida 33130
(305) 358-0427

HOPPE & STOKES, P.A.
66 West Flagler Street
Second Floor
Miami, Florida 33130
(305) 358-9060

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED JULY 23, 1997

Carlos DIAZ, as personal representative of the Estate of Lazaro Diaz on Behalf of the Estate of Lazaro Diaz and on Behalf of Juan Diaz and Yolanda Diaz, as survivors of Juan Diaz and Yolanda Diaz, as survivors of Lazaro Diaz,

Appellants,

v.

CCHC-GOLDEN GLADES, LTD., a limited partnership with Commonwealth Continental Health Care, Inc., general partner, d/b/a Golden Glades Regional Medical Center, Ltd.,

Appellee.

District Court of Appeal of Florida,
Third District.

July 23, 1997.

No. 96-467

Before SCHWARTZ, C.J., and COPE and LEVY, JJ.

SCHWARTZ, Chief Judge.

Primarily because of the legislative history set out by the Fourth Circuit in *Power v. Arlington Hospital Association,* 42 F.3d 851, 862–63 (4th Cir. 1994), reversing *Power v. Arlington Hospital,* 800 F.Supp. 1384 (E.D.Va. 1992) on this point, we

are forced to the conclusion that the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C.A. §1395dd(d)(2)(A)(1992),[1] incorporates all the vagaries of the state medical malpractice law in the determination of the damages recoverable in an action under the Act. Accord *Reid v. Indianapolis Osteopathic Medical Hosp., Inc.*, 709 F.Supp. 853 (S.D.Ind. 1989); see also *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 714–15 (4th Cir. 1993).

The unfortunate result in this case, as was correctly held below, is that under the thus applicable exception provided in section 768.21(8), Florida Statutes (1995),[2,3] the present plaintiffs have no meaningful EMTALA (or Florida) claim whatever for the death of their adult child even if, as alleged, the defendant hospital violated the statute.

Affirmed.

---

1. **(A) Personal harm**

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

2. (8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s.7666.106(1).

3. Because there is no contention that section 768.21(8) is itself invalid, cf. *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993), *cert. denied*, 510 U.S. 915, 114 S.Ct. 304, 126 L. Ed.2d 252 (1993); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987); *Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986), we note but do not pass upon that possibility.

APPENDIX B — FINAL JUDGMENT BY THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA DATED JANUARY 25, 1996

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 92-3615 CA 22

CARLOS DIAZ as Personal Representative of the Estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ,

Plaintiff,

vs.

STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES; CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC. general partner d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.,

Defendants.

FINAL JUDGMENT FOR DEFENDANTS, CCHC-GOLDEN GLADES, LTD. A LIMITED PARTNERSHIP WITH COMMONWEALTH CONTINENTAL HEALTH CARE INC. general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.

THIS CAUSE having come before the Court, and the Court having been advised that the Plaintiff has filed a Notice of Dropping Claim by which the claim of the Estate of Lazaro

Diaz for damages has been dropped, and being advised by the Plaintiff that the claim of JUAN DIAZ and YOLANDA DIAZ for funeral expenses incurred as a result of the death of LAZARO DIAZ is abandoned, and the Court finding that the liability claims brought by the Plaintiff against the Defendants, CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC, general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD., fail for want of a compensable damage claim as a result of the partial summary judgment entered in favor of Golden Glades Regional Medical Center on October 10th, 1995,

IT IS ADJUDGED that Plaintiff, CARLOS DIAZ, as Personal Representative of the Estate of LAZARO DIAZ on behalf of the Estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ, take nothing by this action and that Defendants, CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC, general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD., shall go hence without day.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 25th day of January, 1996.

s/ Robert P. Kay
CIRCUIT COURT JUDGE

Copies furnished to:

Mark L. Stokes, Esquire
Jeffrey N. Schwartz, Esquire
A. Scott Lundeen, Esquire

APPENDIX C — DECISION OF THE SUPREME COURT OF FLORIDA DATED DECEMBER 8, 1997

SUPREME COURT OF FLORIDA

MONDAY, DECEMBER 8, 1997

CASE NO. 91,295

District Court of Appeal,
3rd District — No. 96-467

CARLOS DIAZ, etc.,

Petitioner,

v.

CCHC-GOLDEN GLADES, LTD., etc.,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3 (b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

OVERTON, SHAW, WELLS and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.

Appendix C

A True Copy

TEST:
s/ Sid J. White
Clerk, Supreme Court

BH
cc: Hon. Louis J. Spallone, Clerk
Hon. Harvey Ruvin, Clerk
Hon. Robert P. Kaye, Judge

Mr. Arnold R. Ginsberg
Ms. J. Lorraine Brennan
Mr. Mark L. Stokes